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Supreme Court of the United States

October Term, 1941

No. 540

314-66.
314US # 4
NIC-OMA

In the Matter

of

SARAH M. NICHOLS, BANKRUPT

PETITION FOR WRIT OF CERTIORARI

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PRESS OF THE WEBSTER-BOULTER COMPANY

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Supreme Court of the United States

October Term, 1941

No.

In the Matter

of

SARAH M. NICHOLS, BANKRUPT

Petition for Writ of Certiorari

John Remington Nichols, Russell Mabbatt Nichols, and Walter Rogers Nichols, by their counsel, pray that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit, to review the decree of that Court entered in the above entitled cause on June 9, 1941, affirming an order of the United States District Court dismissing a petition to review an order of the Referee in Bankruptcy.

Opinions Below.

The opinion of the District Court is not reported but appears on pages 38 to 44 of the Record. The opinion of the Circuit Court of Appeals is reported in 120 Fed. (2d) ——and appears on Page 84 of the Record.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C.A., Sec. 347). The decree of which a review is sought was entered on June 26, 1941. This petition is presented as of August 19, 1941.

STATEMENT.

In order to give more detailed references to the Record and to conform to references used in the court below, the relevant portions will be hereinafter designated by the side-page or folio numbers rather than by the numbers at the tops of the pages. For example, a reference to (fol. 65) will mean that portion of the Record on page 22 which lies between the numbers 65 and 66 in the left-hand margin.

In 1899, one Eli F. Rogers died in Branford, Connecticut, leaving a will by which he gave the life use of his property to his wife and then provided as follows:

> "*Fifth.* I give, devise and bequeath to my niece Emily N. Mabbatt, or her issue, and to my nephew Edward H. Rogers, or his issue, all the rest, residue and remainder of my estate both real and personal, to be divided equally between them (per stirpes) share and share alike (and in the event that either my niece Emily N. Mabbatt, or my nephew Edward H. Rogers should die before my wife Sophia M. Rogers, leaving no issue surviving at that time it is my will that all the residue go to the survivor,) to them and their heirs forever." (Rec., fol. 212.)

His niece predeceased him, leaving five children, of whom one was Sarah M. Nichols. Mrs. Nichols went into voluntary bankruptcy in 1912 in New York, dying a few months later a resident of Branford, Connecticut, and without having applied for a discharge (fol. 63). Debts totalling $6,039.10 were scheduled (fol. 166), but it does not appear how many were proved. Apart from the claims of V. T. Hammer, totalling $3,460, the largest of them was $746.05. No Trustee was elected and the case was closed on December 8, 1913, as a no-asset case (fol. 63). No interest under any will was scheduled (fol. 168). It does not appear that Mrs. Nichols had actual knowledge of any interest under the Rogers will or under the Norton will hereinafter mentioned.

Mrs. Rogers having died in 1915, the Probate Court ordered a distribution of the remainder, after hearing upon legal notice, under which one-tenth of the estate was distributed in 1917 to the Estate of Sarah M. Nichols (fol. 188). The Probate Court did not publish the reasons for this conclusion of law. At the hearing thereon, no creditor appeared to claim the benefit of the legacy by reason of the prior adjudication. In 1917, an administrator of the Nichols estate was appointed by the Branford Probate Court, six months were limited to creditors to present claims, and the Rogers legacy was turned over (fols. 64, 236, and 188). No claims were presented (fol. 242), but the administrator did nothing further to settle the estate until 1939, when an inventory and account were filed, showing a balance on hand of about $6,000. and asking for an order of distribution (fol. 190). The Probate Court set the hearing thereon for a month ahead and, pursuant to its order, notice was given to all creditors appearing in Mrs. Nichols' bankruptcy schedules as well as to officials of the bankruptcy court and to the Nichols heirs (petitioners herein) (fols. 194-203). Before a decision was rendered, no creditor having appeared in the Probate Court, a creditor having a claim of $746.05 obtained an *ex parte* order from the District Court in New York on January 24, 1940 (fol. 205), reopening the bankrupt estate, and obtained the appointment of an ancillary receiver in the District Court of Connecticut, together with an injunction against transfers of the Nichols property (fols. 65 and 66). As a result of these proceedings, no decision or order was ever entered by the Probate Court.

Since the inception of the present proceedings, the Supreme Court of Errors of Connecticut has handed down its decision finding that a legacy of $10,000. (with interest for about three years) should be paid to the estate of Mrs. Nichols under the will of Henry B. Norton, who died in Norwich, Connecticut, in 1893, which legacy had been awarded by the trial court to other persons and in which appeal the present petitioners were appellants. *Congregational Home Missionary Society* vs. *Thames Bank & Trust Co.*, 127 Conn. 1 (1940). This legacy will obviously be subject

to the same disposition as may be made of the funds in dispute here.

Upon petition for a summary turnover order, made by the Trustee in bankruptcy and brought against the Nichols administrator and the present petitioners, the Referee granted the petition and the District Court dismissed a petition for review, which action was affirmed by the Circuit Court of Appeals.

The Question Presented.

The question presented is as to whether the funds in the hands of the administrator should be distributed to the heirs at law of Mrs. Nichols according to the Connecticut statute of distributions or should be turned over to the Trustee in bankruptcy for administration in New York.

Specifications of Error.

The Circuit Court of Appeals erred:

1. In not applying the two-year limitation upon suits by the Trustee contained in Section 11 (d) of the Bankruptcy Act of 1898.

2. In not holding the creditors of Mrs. Nichols barred of the funds by their laches.

3. In not holding the creditors barred by the statutes of limitation.

4. In not holding the creditors barred by failure to present their claims to the administrator within the time limited by the Probate Court.

5. In not holding the Trustee barred of the funds by the barring of all the creditors.

6. In allowing the creditors and Trustee more than a reasonable time to recover unscheduled assets after they knew or ought to have known of their existence.

7. In not holding the Rogers and Norton legacies to be burdensome assets, recoverable only by legal action, and therefore subject to the Trustee's election to assume or not to assume title to them.

8. In holding that the legacies were required to be scheduled.

9. In holding that title to the funds passed to the Trustee in 1940.

10. In staying the Probate Court proceedings (in effect) after the lapse of more than two years, contrary to the Bankruptcy Act of 1898.

11. In denying (in effect) the jurisdiction of the Probate Court to determine conclusively the distributees of the Rogers estate.

12. In not holding the petitioners herein to be the legatees under the Rogers will.

13. In not ordering the Probate Court relieved of all restraints upon its jurisdiction to distribute the Nichols estate by dismissing the Trustee's petition for a summary turnover order.

Reasons for Granting the Writ.

I.

The Decision of the Circuit Court of Appeals is in Conflict Upon Essential Points with Decisions of the Circuit Court of Appeals for the Sixth Circuit.

(a)

The Court below has tacitly approved the decision of the trial court recognizing the rule that a trustee in bankruptcy must proceed to recover unscheduled assets within a reasonable time after receiving knowledge of their existence but measuring this time from the date of actual notice rather than from the date of constructive notice. In this, the decision is directly contrary to that in *Mills Novelty Co.* vs. *Monarch Tool & Mfg. Co.*, 49 Fed. (2d) 28 (C.C.A. 6, 1931).

In that case, a trustee was charged with notice of the issue of a patent, actual notice not being proved, and, having made no attempt to recover the asset for seventeen years, was held barred of his right thereto. Here, the Trustee has sought to recover an asset of which he had constructive knowledge at least since 1916 through distribution of the Rogers estate,—*Packer* vs. *Meeks*, 96 Conn. 319, 324 (1921)—but nothing was done indicating an intention to claim it until 24 years later and then only after petitioners, as heirs of Mrs. Nichols, had shouldered the burden of bringing the settlement of the estate to completion and of a three-year litigation to recover the Norton legacy. The two decisions cannot stand together. It is highly important that the conflict be resolved, for the rule of law, if allowed to stand, must be applied to other facts than these. It is fortuitous that no real estate was involved in the instant case; if it had been, the effect of the decision below would be disastrous if used as a precedent, for real estate titles could not be determined with reasonable certainty for fear of unasserted claims in bankruptcy being asserted long years afterward, with no means of knowledge of the bankruptcy proceedings if they happened to be in another jurisdiction than the real estate.

Even if the date of actual notice is controlling, the Mills case and this one are still in essential conflict. The creditors,—who cannot enlarge their rights by the simple expedient of subsequently having a trustee appointed,—knew of the Nichols assets on November 18, 1939, when they received actual notice of a hearing on the distribution thereof to be held on December 18, 1939. They waited until more than a month after the hearing before performing the simple act of obtaining an *ex parte* order to reopen the bankrupt estate and before notifying anyone concerned that they claimed the property. Reasonableness must be measured according to circumstances, and it is submitted that this delay was unreasonable as a matter of law. It is only by chance that the assets were not distributed and dissipated before the creditors acted at all. Even then, action was taken by a single creditor, having a comparatively small claim which it undoubtedly had long since charged off its books.

Constructive notice is merely notice which the law imputes to one who would have had actual notice if he had used reasonable diligence to protect his rights. Here, in addition to the constructive notice from the probate records, the creditors would have known the essential facts in 1913 or 1914 if they had made any reasonable attempt to collect their claims when they found that no discharge in bankruptcy had been sought. The case for constructive notice here is far stronger than in the Mills case.

(b)

It was unnecessary for the Court below to decide the exact technical question as to whether Mrs. Nichols' interests under the Rogers and Norton wills were in fact vested or contingent remainders within the legal meaning of the words. A remainder may be technically vested, and yet be so uncertain as to be incapable of being levied upon by creditors,—*Smith* vs. *Gilbert*, 71 Conn. 149 (1898),—or assigned by the remainderman,—*Smith* vs. *Pendell*, 19 Conn. 107 (1848); *Bartholomew* vs. *Muzzy*, 61 Conn. 387 (1891). Interests so contingent that three years of litigation are needed (as under the Norton will) to settle their nature are of this class even though they be ultimately found vested. Such interests need not be scheduled in bankruptcy and do not pass to a trustee. *In re Martin*, 47 Fed. (2d) 498 (C.C.A. 6, 1931). Cp. *In re Meiberg*, 1 Fed. Supp. 892 (D.C., Iowa, 1932).

The Court below decided in direct opposition to the Martin case. The conflict is important, for bankrupts ought not lightly to be charged with duties with respect to doubtful estates of which they may have no actual knowledge or creditors lightly to be relieved of all obligation to investigate the collectibility of their claims after a discharge can no longer be asked. There is no question here of the alternative being to condone a willful concealment of assets, for the record is barren of indication that Mrs. Nichols knew of the terms of the wills of two comparatively distant relatives who had died over twelve years before her bankruptcy. In the Rogers estate, she did not even have legal notice of the hearing

on probate of the will (let alone of the terms of the instrument itself), for the notice ordered (fol. 225) was not given according to its terms (fol. 226).

II.

THE COURT BELOW HAS DECIDED IMPORTANT QUESTIONS OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

(a)

For twenty-seven years after Mrs. Nichols' death, no trustee of her bankrupt estate was appointed, and no discharge had ever been applied for. Any claim to the property distributed to her estate in 1917 must then have been made by the creditors as such. They then represented their own interests. Under the local law, the creditors were free to start suit at any time. *American Woolen Co.* vs. *Maaget,* 86 Conn. 234 (1912). They were thus within the class required by the local law to present their claims to the administrator within the time limited by the Probate Court which expired in 1917. Conn. Gen. Stat., Rev. of 1930, Sec. 4914. Such presentation was a substantive part of their claim, the statute not operating as a statute of limitations which could be tolled. *Grant* vs. *Grant,* 63 Conn. 530, 546 (1893).

The Court below has decided contrary to the law thus laid down. Its decision makes the determination of the necessity of presenting claims against decedents' estates (of which public policy demands a prompt settlement) depend upon whether or not a trustee is appointed decades later. If real estate were involved (as it might well be in some later case to which the ruling here laid down will be applied), an intolerable uncertainty would ensue.

(b)

The rights passing to the Trustee must be adjudged as of the adjudication in 1912. *Bailey* vs. *Baker Ice Machine Co.,* 239 U. S. 268, 275 (1915). Whatever changes in local law may have

occurred since, it seems quite certain that the Connecticut law then considered a gift to a class,—taking effect after an intervening life estate,—as vesting at the testator's death but subject to opening to let in after-born members of the class and to drop those who had died after the testator and before the life tenant.

Bolles vs. *Smith*, 39 Conn. 217 (1872).
Jones' Appeal, 48 Conn. 60 (1880).
Farnam vs. *Farnam*, 53 Conn. 261 (1885).
Belfield vs. *Booth*, 63 Conn. 299, 304 (1893).

The Farnam and Jones cases have been recently approved in *Trowbridge* vs. *Townsend*, 112 Conn. 104, 112 (1930), in which, however, circumstances not here present led to a different result on the facts.

There can be no doubt that an alternative gift to the "issue" of Emily N. Mabbatt (fol. 212) has all the attributes of a gift to a class. The decision below runs counter to these decisions of the Connecticut courts. The distribution made in 1916 does not preclude the application of the correct construction of the Rogers will and the remedying of the injustice done then. *Home Trust Co.* vs. *Beard*, 116 Conn. 396 (1933). If incorrect but conclusive, the question may still be an element in determining the equities in favor of the petitioners. The probate decree of 1916 need not be attacked in order to send the property where the Probate Court must have expected it to go when that decree was entered; it is necessary only to remove the bar to orderly distribution of the Nichols estate by dismissing the Trustee's petition for a summary turnover order.

(c)

Under local law, when the Probate Court has possession of the *res*, its proceedings are *in rem* and its orders are sufficient to bind all parties in interest, whether present or absent. *Rockwell* vs. *Bradshaw*, 67 Conn. 8, 18 (1895).

The Probate Court had unquestioned jurisdiction to order distribution of the Rogers estate and find who were the distributees. All persons having any claim to a portion of his estate were bound to appear and present their arguments at that time, including the creditors of Mrs. Nichols, who were not then (1916) represented by the Trustee. When it was ordered that one-tenth of the estate be distributed to the estate of Mrs. Nichols, any claim that her legacy had vested by operation of law in someone else became barred. By such order, the property was left still within the probate jurisdiction, so that the order to present claims within six months or be barred was binding on all concerned.

The Court below has rejected this local law and has refused to give binding character to the order of the Probate Court.

III.

This Case Presents Important Questions of Federal Law Which Have Not Been But Ought to be Settled by This Court.

Questions involving the construction and applicability of the Bankruptcy Act are clearly federal questions. *Hammond* vs. *Whittredge*, 204 U. S. 538, 547 (1907).

The Bankruptcy Act has no specific provisions covering the effect of failure to apply for a discharge, the effect of failure to elect a trustee for a long period of years, the effect upon the rights of a trustee of the barring of creditors' claims by laches, limitation, or otherwise, or the duties of creditors to pursue their own claims after the closing of an estate as a no-asset no-trustee case. Nor has this Court directly construed the two-year limitation on suits by or against a trustee contained in Section 11(d) of the Bankruptcy Act. Few if any paragraphs on these subjects are included in the standard law digests. These are all important questions, frequently arising in ordinary practice. Rules laid down in this case will govern those cases as well where real estate is involved, so that the security of titles demands authoritive answers to the

problems. It is necessary at present to rely largely upon a few state court decisions covering different phases of the questions.

American Woolen Co. vs. *Maaget,* 86 Conn. 234 (1912).
Durrett vs. *Harris,* 148 Ark. 4 (1921).
Stipe vs. *Jefferson,* 192 Minn. 504, 506 (1934).
Pink vs. *Tenenbaum,* 294 N. Y. S. 101 (App. Div., 1937).
Watson vs. *Motley,* 201 Ala. 25 (1917).
Roberts vs. *Martin,* 158 Ky. 124 (1914).
Rand vs. *Sage,* 94 Minn. 344 (1905).

Decisions in such cases as *Johnson* vs. *Collier,* 222 U. S. 517 (1912), and *Danciger etc. Oil Co.* vs. *Smith,* 276 U. S. 542 (1928), skirt the edge of such problems but are concerned with special fact situations which destroy their usefulness as guides where more general problems are involved.

IV.

THE COURT BELOW HAS DECIDED IMPORTANT FEDERAL QUESTIONS IN PROBABLE CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Martin vs. *Commercial National Bank,* 245 U. S. 513, 519 (1918), seems to hold that a trustee is barred if the creditors whom he represents have become barred. The Court below, in refusing to consider the creditors as creditors during the period between 1913 and 1940 has failed to follow the implications of this decision.

Kinder vs. *Scharff,* 231 U. S. 517 (1913), holds that the two-year limitation upon suits by the Trustee (Bankruptcy Act, Section 11(d)) is not removed by a subsequent order reopening a closed estate. The Court below has failed to follow the admonition of that decision (P. 520) that "It is obvious that there must be some limits if the promise of repose after two years in Section 11 d is not to be a mirage." Instead, it has followed a line of decisions construing the Act of 1867, of which the provisions are inapplicable to the present situation.

In *Murphy* vs. *John Hofman Co.*, 211 U. S. 562, 569, (1909), and *Isaacs* vs. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737 (1931), this Court held that when one court has possession of property, through its officers, all other courts lose jurisdiction. Cp. *In re English*, 127 Fed. 940, 943 (C.C.A. 2, 1904); *In re Naslund*, 6 Fed. Supp. 109 (D. C., Wash., 1933). In denying the Probate Court the right to make a conclusive distribution of the Rogers estate, the Court below has decided contrary to these decisions. The same principle would apply to the property after it had passed into the possession of other officers of the same court under a decree (the 1916 distribution) which the Trustee has not attacked, so as to make the funds subject to the claims of only those creditors who presented claims within the time limited by the local law.

In *Sparhawk* vs. *Yerkes*, 142 U. S. 1, 13 (1891), it was held that a trustee must elect within a reasonable time whether to take title to a potentially onerous asset or to abandon it. There is no logic in lengthening the time for such election by the mere failure to elect a trustee for an unreasonable period. In such case, the election must be made by either the creditors or the bankruptcy court itself. The Court below refused to apply this rule on the ground that the assets were not onerous. The creditors themselves thought the assets sufficiently doubtful of recovery to make it inadvisable to participate in the 1939 probate proceedings of which they had adequate advance notice. Probate proceedings are not had on the motion of the Probate Court; somebody must initiate them and supervise them. The creditors here left it to the petitioners to agitate in that court when the administrator took no action for 22 years. The time and expense of the present proceedings can hardly be disregarded in characterizing the onerous quality of the assets. Furthermore, the ruling in this case will manifestly govern the legacy considered in *Congregational Home Missionary Society* vs. *Thames Bank & Trust Co.*, 127 Conn. 1 (1940). The three years of litigation supported in that case by the petitioners here before adverse rulings of the lower court were overturned must necessarily constitute a burden about which a trustee would have

to think twice before assuming it. To call these assets "of unquestioned value, and in no contingency burdensome," when nobody knew in advance whether the Trustee would recover a cent, is too unreal to accept. If that conclusion is rejected, the decision is in conflict with the Sparhawk case.

V.

THERE BEING NO CONTROLLING PRINCIPLE OF LAW, THE DECISION BELOW REACHES A MANIFESTLY UNJUST RESULT.

This is not one of the grounds stated in the rules of this Court for granting certiorari. However, the whole end and purpose of appellate courts is to prevent injustice, so that the influence of such a cause upon the discretion to grant a review ought reasonably to be a strong and persuasive one.

There is no controlling principle of law which dictates one result or the other upon the unusual facts of this case. The Court is in a position here to do abstract justice with greater freedom from binding and imperative precedent than has ordinarily been the case with courts since Solomon so wisely decided between the two mothers. The Court below has chosen to ignore this opportunity and to substitute for it an adherence to technicalities which ought not to fetter the modern administration of justice; for example, the distinctions drawn between having or having not reduced the property to possession, when clearly the petitioners herein have been throughout seeking the aid of proper courts to obtain possession of what equitably belonged to them; and also the attention paid to the fact that the administrator has never claimed the funds adversely to the bankrupt (overlooking the administrator's adverse holding against the Trustee, as evidenced by its call upon creditors to present their claims in 1917), whereas it is manifest that the administrator has no controversial interest in the ownership of the funds but is concerned only with protecting itself by delivering the money to those whom the courts say own it.

The injustice claimed by petitioners here lies in awarding to the non-vigilant the fruits of another's vigilance, labor, and expense. The holder of more than half the scheduled claims, V. T. Hammer (fol. 166), has taken no part in these proceedings, which were instituted by one who had held its claim of only $746.05 for over a quarter-century without any attempt to collect or, apparently, to ascertain the probability of collecting. By exercise of reasonable diligence in the years from 1913 to 1917, this creditor could have obtained payment of at least a substantial dividend, leaving the later inheritance from the Norton estate to pass unburdened to the petitioners. Now, having done nothing, having left to petitioners the burden of litigation and of the ordinary probate proceedings, having stood idly by even when it received actual notice of a hearing in 1939 upon the ownership of the fund, it is in position to obtain payment, not only of the full principal of its account, but also of interest for 27 years at rates which practically no property can earn today, carrying along with it the entirely inactive creditors. In addition, the fees of the bankruptcy court and of the Trustee and his attorney, added to the claims and the accrued interest, will in all probability obliterate any balance payable to the petitioners as heirs of Mrs. Nichols,—a balance which would have been substantial had the creditores been vigilant in 1913. The result also dedicates to the creditors the results of the long litigation in the Norton estate. The creditors are allowed to stand like a vulture ready to reap the rewards of a long and doubtful contest, with no contribtuion whatsoever to the manifest expenditure of time and money which alone could have brought the result achieved. It is true that the Norton legacy is not technically before the court now; but the decision of the Connecticut Supreme Court is matter of judicial notice, and the point heretofore made is impressively emphasized,—that the ruling made here will also control other sets of fact and be used as a precedent where differences in details would make a similar ruling unjust and oppressive. The only suggestion of a weakness in the justice of the claims of petitioners is the assertion that they must claim under a constructive fraud of their mother, Mrs. Nichols, in not

scheduling these two legacies. But there is no evidence in the record that she knew of their existence, the testators had died in 1893 and 1899 in places remote from her residence at the time of the bankruptcy, both legacies were highly contingent from her point of view (whatever their technical character) in both fact and law, for she had no foreknowledge of events in 1915 and 1937 (when the life estates fell in) or of the construction that courts would put upon the two wills. The claims of justice appear overwhelmingly on the side of the vigilant and active and against those who have slept on their rights, rejecting the burden of enforcing them; on the side of those who, if successful, will leave the others in no worse position than they were before, and against those whose success will leave the petitioners, not only deprived of their expected inheritance, but also with the burden of time and expense which they have incurred in making the money available at all to any of the parties hereto.

Wherefore it is submitted that this petition for a writ of certiorari ought to be granted.

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APPENDIX

APPLICABLE PORTIONS OF CONNECTICUT STATUTES, REVISION OF 1930.

Section 4914. Limitation of time for presenting claims.

"The court of probate may order executors and administrators to cite the creditors of the deceased whose estate is in settlement before it to bring in their claims against such estate within such time as it shall limit, not more than twelve months nor less than six months, by posting a notice to that effect on the signpost nearest to the place where the deceased last dwelt and in the same town and by publishing the same in a newspaper having a circulation in the probate district in which such estate is in settlement and by such further notice as such court may deem necessary, or, in case such deceased was not a resident of this state, by posting such notice on such signpost in the probate district in which such estate is in settlement, and by such other notice as such court may direct; and, if any creditor shall fail to exhibit his claim within such time as may be limited by such order, he shall be barred of his demand against such estate; but, when a right of action shall accrue after the time limited for the presentation of claims, it shall be exhibited within four months after such right of action shall accrue and shall be paid out of the estate remaining after the payment of the debts exhibited within the time limited. Such court may, for cause shown upon hearing after public notice, limit a further time for the presentation of claims, not exceeding the period which it might have originally limited; and may, if any creditor, through no default of his own, shall have failed to present his claim within the time limited, for cause shown upon hearing after public notice, extend the time for such creditor to present his claim not more than thirty days beyond the period which it might have originally limited . . ."

OCT 1 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 540

IN THE MATTER

OF

SARAH M. NICHOLS,

Bankrupt.

TRUSTEE-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

OCTOBER TERM, 1941

No.

IN THE MATTER
OF
SARAH M. NICHOLS,
Bankrupt.

TRUSTEE-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Patrick J. Tuffy, the Trustee of the bankrupt estate of Sarah M. Nichols (now deceased) (fols. 42-43), opposes the petition of the deceased bankrupt's three sons to have this Court review a Referee's order (fol. 88) directing The Branford Trust Company of Branford, Connecticut, individually, and as administrator of the estate of Sarah M. Nichols, deceased, to turn over to the Trustee certain monies or funds in its possession. The order contained no provision or direction relating to the petitioners (fol. 88). The petitioners are not aggrieved parties. The Referee's order was confirmed by the District Judge of Connecticut (fols. 130-131) and affirmed unanimously by the Second Circuit Court of Appeals (120 F. [2d] 906).

Errors in the Printed Record

At folio 66 of the printed record below, the year "1939", appearing twice, should read "1940" in both instances.

Facts

For brevity and clarity, we state the facts as concisely as possible. This is simpler and more satisfactory than supplying the matter omitted from the petitioners' statement. Besides, it will dispel many of the factual fancies and inconsistent contentions of the petitioners without according particular treatment to each of them.

Sarah M. Nichols (nee *Sarah Updike Mabbatt,* 127 Conn. 1, 14 A. [2d] 626), while residing and engaged in business at No. 105 East 15th Street in New York City (fols. 163, 172), filed a voluntary petition in bankruptcy in the Southern District of New York, on December 18, 1912, and was duly adjudicated the same day (fols. 26-27, 163, Exs. C, E). Her filed schedules, in the form prescribed by this Court, listed liabilities of $6,039.10, a small amount in assets which proved to be utterly worthless (fols. 163-167, Ex. C, Sched. A), and set forth in Schedule B(4) "None" opposite "Property in Reversion, Remainder or Expectancy, and Rights and Powers, Legacies and Bequests" (fols. 167-171, Ex. C, Sched. B). Thus, Mrs. Nichols failed to schedule her vested interest in the remainder of the estate of Eli F. Rogers, deceased, the proceeds of which are the immediate concern of this summary proceeding, and her vested interest in the income from a trust fund as well as a $10,000 vested interest in the remainder under the will of Henry B. Norton, deceased (fols. 167-171, Ex. C, Sched. B; fols. 172-173, Ex. E; 127 Conn. 1, 14 A. [2d] 626).

This omission was deliberate. The probate records in Connecticut only recently disclosed that Mrs. Nichols received annually in semi-annual payments between $700 and $900 from the income of the trust fund from 1891 to May, 1912, having received nearly $400 therefrom less than two months prior to filing her petition and nearly $400 additionally within five months after such filing.

In her examination at the first meeting of creditors Mrs. Nichols continued the concealment of these assets (fols.

172-173, Ex. E). Nowhere in the proceedings did there appear any reference to or indication of her Connecticut connections (fols. 172-173, Ex. E). After her examination was closed, Mrs. Nichols returned to Connecticut, taking up residence in Branford. This fact also was concealed from the Bankruptcy Court and creditors. She died there on May 29, 1913, without having applied for a discharge, leaving her three sons, the petitioners here, surviving (fols. 30-31, 192-193, 230, 232, Exs. N, X). This fact also was concealed from the Bankruptcy Court and creditors until November, 1939, when the Probate Court in Branford made an order requiring that notice of a hearing on the account of the administrator of Sarah M. Nichols, deceased, be mailed to the Referee and Clerk of the Bankruptcy Court and "to all scheduled creditors and all creditors who filed claims in the bankruptcy proceedings" (fols. 194-203, Ex. X).

No assets having been discovered, no trustee having been appointed and no application therefor having been made, the Referee filed his certificate to that effect on December 8, 1913, under the then Rule 9 of said Court and "closed" the case to enable the Clerk of the Court to disburse the fees deposited with him at the commencement of the proceedings (fol. 30).

In November, 1939, the Bankruptcy Court and creditors received the notice of the hearing on the administrator's account in the Nichols estate, and, upon investigating, discovered, for the first time, the interest in the Rogers estate, that it had been reduced to cash and was in the possession of The Branford Trust Company as administrator of Mrs. Nichols' estate (fols. 19-20, 40).

On January 24, 1940, on application promptly and properly made by one of the creditors, an order was duly made reopening the administration of the estate (fols. 35, 205-206, Ex. F). Thereafter, Patrick J. Tuffy was elected and qualified as Trustee (fols. 16, 42-43) and brought these summary turnover proceedings against The Branford Trust Company, individually, and as administrator of

Sarah M. Nichols (fols. 11, 46), and included the three sons of Mrs. Nichols, the petitioners here, as incidental parties (fols. 10-11, 45-46).

The Circuit Court mistakenly states that the petitioners here "answered the petition on the Trust Company's failure to do so and contested it below" (120 F. [2d] 906, 908 [1]). The Trust Company did answer the petition (fol. 4, par. 5) and contested on the hearing (fols. 110-111, [4] and [7]) and the motion and the turnover order entered thereon was directed solely against it (fols. 12, 46, 88, 108). The petitioners have no right to a review.

The petitioners here also answered below with various admissions, denials and new matter but nothing was set up or claim made for any affirmative relief in their favor (fols. 49-58). Neither did their answer assert any alleged two-year ban against the Trustee under Section 11(d) of the Bankruptcy Act, or of a bar of "laches" against the creditors.

On December 14, 1877, Eli F. Rogers, at Branford, Connecticut, made his will, by the Fifth paragraph of which he gave one-half of the "rest, residue and remainder" of his estate "to my niece Emily N. Mabbatt, or her issue" "per stirpes" (fol. 212). This was subject to a life use by Sophia M. Rogers, his wife (fol. 209).

Emily N. Mabbatt (Hatch) (fol. 23, par. 9) died intestate on August 3, 1895, leaving her surviving her issue, Sarah M. Nichols and four others (fols. 24, 186, 188, 223-224, 230, 232, Exs. J, O). There was no administration of her estate (fol. 24, par. 11).

In February, 1899, Eli F. Rogers died, survived by his widow, Sophia M. Rogers, and the issue of Emily N. Mabbatt (Hatch), which included Sarah M. Nichols (fols. 24-25, par. 12, fols. 223-224).

On March 13, 1899, the will was admitted to probate and recorded (fol. 221). Notice of the application to probate the will was duly given to Sarah M. Nichols as well as to her sisters and half-brother (fols. 223-226). Norton Hatch, one of the issue, died intestate (fols. 23, 26). Thereafter

Sarah M. Nichols died intestate on May 29, 1913, survived by three sons, the petitioners here (fols. 30-31, 192-193, 230, 232, Exs. N, X). There was no administrator of her estate appointed until 1917 (fols. 35, 235, Ex. T).

On April 27, 1915, Sophia M. Rogers, the life user, died intestate, survived by the three sons of Mrs. Nichols, among others (fol. 31, par. 23; fol. 63).

The Branford Trust Company then was appointed administrator d. b. n. c. t. a. (fol. 31) and subsequently filed its account showing Sarah M. Nichols as having a vested one-tenth interest in the rest, residue and remainder of the Rogers estate, which amounted to $2,613.17 (fols. 32, 175-177, 184, Exs. M, O). On July 18, 1916, the Probate Court ordered that notice of the hearing on the account and on the application for an order ascertaining the distributees and ordering distribution be given by publishing the order three times in a newspaper in the district and by posting it in Branford and, further, that a copy of the order be mailed to William E. Hatch (the half-brother of Frank Norton Hatch [then deceased], and stepson of Mrs. Emily Norton [Mabbatt] Hatch), Walter R. Nichols, Samuel R. Nichols (who is Russell Mabbatt Nichols), John W. Nichols (who is John Remington Nichols), the petitioners herein, and to the three living sisters of Sarah M. Nichols, deceased, who are daughters of said Emily Norton (Mabbatt) Hatch, deceased (Ex. N, fols. 229-230). Proof of the giving of such notice to the persons specified, as required by the order, was duly filed (Ex. N, fols. 231-233). The Branford Probate Court, by order dated August 24, 1916, determined that under the fifth clause of the Rogers will "Sarah M. Nichols formerly of Branford, Conn.," was entitled to one-tenth of the estate to be distributed, as was also "Frank Norton Hatch late of New Bedford, Mass.," who had predeceased Sarah M. Nichols as well as Sophia M. Rogers (fols. 184-186). By the same order the Court appointed the distributors to distribute in accordance with said order.

The return of the distributors, received and accepted by the Probate Court on December 29, 1917, stated that in accordance with the order "We have set out to Estate of Sarah M. Nichols $2453.32" and also "We have set out to the Estate of Frank N. Hatch $2,453.32" (fols. 187-189).

On April 3, 1917, Walter Rogers Nichols, one of the petitioners here, petitioned the Branford Probate Court to issue letters of administration on the estate of Sarah M. Nichols, deceased, to The Branford Trust Company (fols. 30-37, 235-238, Ex. T). To that petition was annexed the written consent of John Remington Nichols and Russell Mabbatt Nichols, the other petitioners here (fols. 35, 235, Ex. T). Letters were issued accordingly on June 14, 1917 (fols. 35-37, 235-236, Ex. T). The inventory and appraisal filed by the Trust Company as administrator of Sarah M. Nichols on November 16, 1939, set forth that the only asset of the estate at the time of her death was "Interest in Estate of Eli Rogers (one-tenth of estate subject to life use of Sophia M. Rogers, aged 80) $2,230.50" (fol. 37).

The three sons of Mrs. Nichols, the petitioners here, continued the scheme to conceal these assets from the Bankruptcy Court and her creditors. They did nothing to cause the estate to be distributed between 1917 and 1939. In 1937, the trust under the Norton will (from which Mrs. Nichols received a portion of the income from 1891 to the time of her death) terminated and the three sons claimed, in the proceedings in the Probate Court at Norwich to determine the distributees, that they were entitled to receive the $10,000 legacy directly under the will. The Probate Court in 1938 so ordered and then they decided to take their chances with the funds derived from the Rogers estate (*Congregational Home Mis. Soc.* v. *Thames Bank & Trust Co.*, 127 Conn. 1, 14 A. [2d] 626). The Trust Company, for its own protection, obtained the order requiring notice to the creditors in the Bankruptcy Court (fols. 39-40, 190-203, Ex. X). In this way the asset was discovered and these proceedings ensued (fols. 39-40).

However, the Trustee in the *Norton* will case appealed and the Superior Court reversed the Probate Court, held that the gift over to issue in that case was void as against the statute against perpetuities in effect when Norton died (but which was repealed in 1895), and that the gift over lapsed, and became part of the rest and residue to be distributed under other clauses of the will.

The petitioners here thereupon appealed to the Supreme Court of Errors of Connecticut, which Court reversed the Superior Court and held that the gift over was void, but that the $10,000 legacy vested in Sarah M. Nichols on the death of the testator in 1891 and should be distributed to her estate (*Congregational Home Mis. Soc.* v. *Thames Bank & Trust Co.*, 127 Conn. 1, 14 A. [2d] 626). Even this was not disclosed except indirectly and indefinitely by citation of the reported decision by their counsel about September 29, 1940, and later by their counsel, who advised that some $11,000 had been paid under the Norton will to the Trust Company as administrator of the Sarah M. Nichols estate. This was in deliberate defiance of the orders of the Bankruptcy Court served in January and May, 1940, on the Trust Company and the petitioners here. A proceeding is pending to compel a turnover of these assets as well.

The Questions Presented:

The real questions presented are:

(1) Can a bankrupt legitimately succeed in the concealment of assets from the Bankruptcy Court?

(2) Can the bankrupt's heirs bar the Bankruptcy Court from jurisdiction over personal property or funds, assets of the bankrupt properly applicable to her scheduled and filed debts, by delayed and concealed manipulation of the assets through the local state courts in a state and district foreign to the Bankruptcy Court of original jurisdiction?

ANSWERING PETITIONERS' POINT I

The decision of the Circuit Court of Appeals in this case does not conflict in any way with the decisions in any other Circuit.

(a)

The Trustee in our case proceeded to recover the unscheduled asset within a month or two after his election and appointment. This time was required to collect complete information and competent evidence to support the turnover application. The Referee, the District Judge and the Circuit Court have held that this was not an unreasonable time (120 F. [2d] 906, 909; fol. 88).

The requirement "to proceed within a reasonable time to recover unscheduled assets" would apply only to a Trustee and not to creditors who are listed or have filed claims in the proceeding, since the title to the asset resides in the Trustee and he must make the decision to accept or abandon or recover the property. The Referee, District Judge and Circuit Court have held that neither the Trustee nor the creditors are chargeable with constructive notice in our case on the facts, that the creditors had no actual notice until about November 20, 1939, and that their reopening the case within two months thereafter was not an "unreasonable time" even if the "rule" claimed by the petitioners applied to the creditors (120 F. [2d] 906, 909; fols. 84-88).

The decision in our case in no way conflicts with that in *Mills Novelty Co.* v. *Monarch Tool & Mfg. Co.*, 49 F. [2d] 28. In that case an innocent purchaser for value brought an infringement suit on a patent and the defendant's defense alleged it had no title, that the title belonged to the Trustee in bankruptcy of the original applicant. The bankrupt did not list in his schedules that the application was pending. The patent issued a year and a half

later. The Circuit Court assumed that the Trustee had filed his account and been discharged within a reasonable time after his appointment. The Trustee and the creditors made no effort at any time to acquire or retain the patent. The infringement suit was commenced thirteen years later. The Circuit Court held that a "patent application" was not a "patent right" or "property", was not required to be scheduled and did not pass to the Trustee when elected; that a "patent application" was in effect a lawsuit which the Trustee could assume or abandon; that the filing of a patent application was not constructive notice, but that when the patent issued it constituted constructive notice throughout the United States; that the Trustee abandoned the application and the patent when issued by filing his account and securing his discharge after the patent issued.

The issuance of a patent is National notice since the Patent Law, Section 39 of 35 U. S. C. A., requires filing in the Federal Patent Office, and Section 40 of 35 U. S. C. A. protects the holder in all of the United States and its Territories.

In our case the Circuit Court has held that local state statutes and orders of local state courts, particularly inferior courts, can have no extra-territorial effect and did not, in this instance at least, constitute constructive notice of any kind to the Bankruptcy Court in New York (120 F. [2d] 906, 908, 909; fols. 86-87).

The distinction between this case and the *Mills Novelty Co.* case is amply shown in the Referee's opinion and by the District Judge and considered by the Circuit Court (120 F. [2d] 906, 909). For brevity, we here adopt the treatment of this case by the Circuit Court (supra) and folios 82-86 and 127-130 of the printed record.

The Trustee here was appointed in 1940 (fols. 42-43) and hence could not be charged with constructive knowledge as of 1916. In the *Mills* case the Trustee was not a party and was not held barred of his right thereto. The Circuit Court there held merely that the attack on plaintiff's title to the patent was not sustained.

Incidentally, the only "burden" on the funds derived from the Rogers estate as well as on the funds derived from the Norton estate and belonging to the bankrupt estate herein has been and is being occasioned by the petitioners in pursuing their scheme to defraud the Bankruptcy Court.

In *Packer* v. *Meeks*, 96 Conn. 319, it was held that an heir, resident in Connecticut, had legal notice of the application to probate her brother's will in Connecticut where the notice was published under the Connecticut statute and a copy mailed to her at the address given by her to the Probate Court for that purpose in order to start the running of her time to appeal from the decree admitting the will to probate. It has no application to this case in any aspect.

(b)

The decision in this case does not conflict with the decision in *In re Martin*, 47 F. (2d) 498. In that case the Trustee in bankruptcy sought to recover an undivided share of an estate resulting from an interest which the bankrupt had not listed in his schedules. It was claimed by the Trustee that at the time of adjudication the bankrupt had a vested interest in part of the property in trust under the will of William H. Wood probated in Tennessee. The Circuit Court held that under the Tennessee statutes and authoritative decisions interpreting and announcing the law in Tennessee, the interest was not vested but one of a contingency subsequent which had not occurred at but did occur subsequent to the date of adjudication and hence was not part of the bankrupt's estate and title thereto did not pass to the Trustee. The case is quite different from this case and the two cases are not in conflict.

At the time of the probate of the Norton will (1891) and of the Rogers will (1899), Mrs. Nichols resided in New Haven, Connecticut, in the same county as Branford. She was mentioned specifically in the Norton

will, being given an interest in the income from a trust fund, from which she actually received between $700 and $900 annually, the next to last semi-annual payment being received by her about a month before she filed the bankruptcy petition, and the last several months later and just before her death, and also a $10,000 legacy payable out of the remainder upon the termination of the trust (127 Conn. 1, 14 A. [2d] 626). She was specifically mentioned for service of notice of the probate proceedings in the Rogers estate (fols. 223-226, Ex. J) and, being a resident of Connecticut, under *Packer* v. *Meeks*, 96 Conn. 319, cited by petitioners, she received legal notice thereof.

The burden was on the bankrupt or her legal representatives in this proceeding to rebut the inference that she knowingly and fraudulently concealed this asset in her schedules and testimony. The rule, stated in *In re Wood*, 98 Fed. 972, has been accepted so universally that it does not appear to have been raised in this Court. The evidence in the Norton instance irrefutably proves her knowledge and the failure to schedule it or disclose it in her testimony establishes the fraud. The proof in this, the Rogers instance, is ample and not refuted. The facts also establish the continuance of the fraud by the petitioners here.

ANSWERING PETITIONERS' POINT II

The Circuit Court's decision conforms with those of the Connecticut Courts on the Connecticut law.

Keogh, Referee, is a Connecticut lawyer and jurist of long standing. Hincks, D. J., is a Connecticut lawyer and jurist whose expressed deliberations are unusually well considered. Clark, Cir. J., the author of the unanimous opinion here criticised by the petitioners, was formerly Dean of the Yale Law School and is a co-author of the authoritative work on Probate Law and Practice in Con-

necticut (Cleaveland, Hewitt & Clark). While each or all of these can err, the Supreme Court of Errors in Connecticut, the State's highest court, has decided the precise question in the Norton will case, referred to above, in May, 1940 (*Congregational Home Mis. Soc.* v. *Thames Bank & Trust Co.*, 127 Conn. 1, 14 A. [2d] 626).

(a)

The failure to apply for a discharge does not destroy the Bankruptcy Court's jurisdiction over the bankrupt's property and its distribution to creditors. It merely leaves open to the creditors the additional right to proceed against the bankrupt's property acquired subsequent to the petition in bankruptcy. It does not relegate the creditor to that remedy only. The creditor still may pursue his remedies in the Bankruptcy Court. Death does not abate the bankruptcy proceedings and her administrator could have applied for a discharge (Sec. 8, c. 541, 30 Stat. 549, 11 U. S. C. A., Sec. 32; *In re Agnew*, 225 Fed. 650; *Shute* v. *Patterson, et al.*, 147 Fed. 509; *In re Spalding*, 139 Fed. 244; *In re Kehler*, 159 Fed. 55).

The acts of the petitioners here in having an administrator appointed and in having the funds from the Rogers legacy paid over to and retained by the administrator, and the acts of the administrator in receiving and retaining said moneys and, further, in receiving and retaining the additional funds from the Norton legacy during the appeal herein, are in direct violation of the provisions of the Bankruptcy Act and the orders of the Bankruptcy Court. If the creditors now pursued their additional remedy by suing the administrator in the Connecticut courts, they might be subject to the statutory bars cited by the petitioners. But in this case the Trustee of the deceased bankrupt seeks to have the administrator of the deceased bankrupt turn over property or funds properly belonging to him as such Trustee and belonging exclusively in the jurisdiction of the Bankruptcy Court.

The Court below did not decide as is asserted in the petitioners' brief under this point. It did decide that, where the Bankruptcy Court obtained jurisdiction, state courts or statutes could not oust it of that jurisdiction nor hamper, hinder or bar its proper proceedings; that the legal representative of a decedent bankrupt may not retain in its possession property existing at the time of the bankruptcy but reduced to possession subsequent thereto and to which the Trustee took title upon qualifying.

(b)

The petitioners argue here that this Court should determine that the Probate Court of Branford, Connecticut, erred in making its order of distribution in the Eli F. Rogers estate on August 24, 1916, which determined that Sarah M. Nichols had a vested interest upon the death of Eli F. Rogers and the admission of his will to probate in 1899. It further argues that this Court now may pass over that determination and direct such a distribution by denying the Bankruptcy Court jurisdiction over the property.

The Circuit Court has held in this case that the bankrupt had a vested interest in the Rogers estate at the time she filed her schedules. The Circuit Court also holds that the Branford Probate Court in the Rogers estate determined she had such a vested interest and that it is binding on these petitioners (120 F. [2d] 906, 910 [12, 13]). The same Probate Court made a similar determination on the petition of these petitioners in issuing letters of administration on the estate and in accepting and approving the appraisers' report in the Sarah M. Nichols estate (fols. 35-38). This determination also is binding on the petitioners here.

The Supreme Court of Errors of Connecticut, in a matter to which these petitioners were parties and appellants, has determined a parallel case involving the Norton will (127 Conn. 1, 14 A. [2d] 626, cited by the Circuit Court, 120 F. [2d] 906, 910 [11]).

The overwhelming weight of authority in Connecticut and elsewhere compels this conclusion on the facts in this case (120 F. [2d] 906, 909, 910; fols. 112-127, Hincks, D. J.; fols. 73-80, Keogh, Ref.; *McArthur* v. *Scott*, 113 U. S. 341, 378, 379; *Doe* v. *Considine*, 6 Wall. 458, 476; *Moore* v. *Lyons*, 25 Wend. 119, 144; *Blanchard* v. *Blanchard*, 1 Allen 223, 227; *In re Haslett*, 116 Fed. 680; *In re St. John*, 105 Fed. 234; *In re McHarry*, 111 Fed. 498; *In re Dorgan*, 237 Fed. 507; *Pollack* v. *Meyer Bros. Drug Co.*, 233 Fed. 861; *Loomer* v. *Loomer*, 76 Conn. 522, 57 Atl. 167; *Gaffney, as Trustee in Bankruptcy*, v. *Shepard*, 108 Conn. 339, 143 Atl. 236.

The Probate Court had jurisdiction over the Rogers estate. It decreed that Sarah M. Nichols was vested, as of the testator's death, with a one-tenth interest in the "rest, residue and remainder" to be paid over to her upon the death of the life user (fols. 184-189, Ex. O); that, having died before distribution, the money should be paid to her estate. The creditors of Mrs. Nichols, at the time of her adjudication, had no claim against the Rogers estate—only against her estate which she herself had brought into the jurisdiction of the Bankruptcy Court. This jurisdiction was exclusive and any attempt by the Probate Court to acquire jurisdiction over the property or funds was in violation of the Bankruptcy Act and the orders of the Bankruptcy Court. The administrator appointed on petition of the petitioners here was an usurper and could not legally acquire title or the right to possession. When the Trustee was appointed, he took title as of the date of adjudication. Local law could have application only to determine whether or not and when her interest vested. And that being determined as of the date of the testator, the property was brought within the exclusive jurisdiction of the Bankruptcy Court.

The Circuit Court so held (120 F. [2d] 910) and the cases cited there support the conclusion squarely. (See also the Referee's decision, fols. 80-87, and cases cited.)

ANSWERING PETITIONERS' POINT III

The case does not present unsettled important questions of Federal law.

This point does not call for the construction or applicability of the Bankruptcy Act. It asserts that the Act does not contain provisions covering various imaginary contingencies. Such argument must be addressed to Congress and not to this Court.

The "two-year limitation" now referred to was not an issue below. It is not mentioned in the petitioners' answer to the Trustee's petition below (fols. 49-59).

The Act requires the proceedings for a discharge to be prosecuted within a specified time, otherwise no discharge is granted. The bankrupt then—common sense dictates—still is liable in full for his debts—for the difference between the amount received through the Bankruptcy Court and the total amount of the debt.

The Act provides the estate may be reopened for cause to administer newly discovered assets and for that purpose a Trustee may be elected, even though it is a "long period of years". The "barring" of creditors remedies in the state courts does not affect their status in the Bankruptcy Court unless the time had run prior to the filing of the petition in bankruptcy.

The Act requires creditors to file claims within a specified time or be barred and the Court takes over the bankrupt's property for distribution. There is no duty imposed upon a creditor to abandon his rights under the Bankruptcy Act and resort only to the state court remedies simply because the case is a "no-asset no-trustee case".

For brevity, we adopt the Circuit Court's (120 F. [2d] 908, 909) and the Referee's treatment of this point (fols. 67-70) which the District Court sustained (fol. 112).

There are two phases to this point, namely, (a) with respect to the application to reopen the administration of the

estate in order to bring these proceedings; and (b) with respect to these proceedings themselves.

The Circuit Court treats this at 120 F. (2d), pp. 908, 909.

The Referee has clearly shown that the application to reopen is not a "suit" within the limitation clause of the Bankruptcy Act as it existed at the time of the bankruptcy as well as under the present state of the statute (fols. 67-70). This is supported by the decision in *In re Paine*, 127 Fed. 246, 11 A. B. R. 351.

The petitioners are indefinite as to how this "question" arises.

Remark that the time of limitation in the statute runs from the date "the estate has been closed" (Sec. 11[d], Bkcy. Act of 1898). If the estate has been "reopened" in accordance with the statute, then it is no longer "closed" and the limitation cannot commence to run until it is "closed" again.

In the case of *In re Schreiber*, 23 F. (2d) 428, cert. denied 277 U. S. 593, it was held that the statutory limitation did not apply either to an application to reopen the administration of the estate or to a proceeding against the bankrupt to recover undisclosed assets.

In our case the bankrupt is deceased and the proceeding was brought against her administrator, her legal representative, and, therefore, it is not brought against "third parties", as petitioners contended below.

Remark, that the petitioners are in the position of mere donees and are not innocent purchasers for value of the assets sought (fol. 85).

In *Kinder* v. *Scharff*, 231 U. S. 517, it was held merely that where an asset was duly disclosed and the Trustee had knowledge of it but that he did not regard it as of any value and asserted no claim or title to it and closed the estate, he could not, more than two years later, when it proved to be of some value, bring an action against third parties, innocent purchasers for value, to set aside the conveyance of the asset to them. The holding in that case has no application here.

These proceedings are properly summary and hence do not fall within the term "suit".

In re Schreiber, 23 F. (2d) 428, cert. denied 277 U. S. 593.

ANSWERING PETITIONERS' POINT IV

The Circuit Court's decision is in accord with the applicable decisions of this Court.

The case of *Martin* v. *Commercial Nat'l Bank*, 245 U. S. 513, involved the validity of a chattel mortgage executed six months prior to but filed only the day before, and hence within four months of, the filing of the petition in bankruptcy. There are no implications that may be drawn from that decision which conflict in the least with the decision here.

It has been pointed out above that the decision of the Circuit Court is not in conflict with this Court's decision in *Kinder* v. *Scharff*, 231 U. S. 517.

Nor does it conflict with *Murphy* v. *John Hofman Co.*, 211 U. S. 562, or *Isaacs* v. *Hobbs Tile & Lumber Co.*, 282 U. S. 734. Both decisions squarely support the Circuit Court's decision in this case, the latter being cited as an authority for the decision (120 F. [2d] 906, 909 [5]). The Circuit Court here held that the Probate Court had jurisdiction to determine the distributees of the Rogers estate. But having determined that a portion was vested in the estate of Sarah M. Nichols it had no power or jurisdiction to administer or affect the Nichols estate which had been given over to the exclusive jurisdiction of the Bankruptcy Court (120 F. [2d] 906, 909 [5], 910 [12, 13]). In addition to the cases cited by the Circuit Court, see also *Lazarus* v. *Prentice*, 234 U. S. 263.

There is no perceivable conflict between the decision in this case and that in *Sparhawk* v. *Yerkes*, 142 U. S. 1.

ANSWERING PETITIONERS' POINT V

The decision is manifestly just.

This is not one of the grounds upon which certiorari is available. Besides, the petitioners, who have schemed and connived to deceive and defraud the Bankruptcy Court, cannot be fitted into an equitable garment, no matter how fancifully they strive.

CONCLUSION

The petition for a writ of certiorari should be denied, with costs and disbursements.

Respectfully submitted,

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